assistance and in turn prompt the termination of our contract with the Social Security Administration for determining eligibility for SSI recipients of medical services, actions we do not voluntarily wish to take. Letter, Burns to Davis, June 15, 1977, J. A., p. 50, 53.

As has been recognized by at least one Court of Appeals and not directly challenged by this Court, there is nothing in the legislative history which suggests that the 209(b) was enacted in order to grandfather in deeming practices. See *Grey Panthers* v. *Administrator, Health Care Finance,* 629 F.2d 180, 185 (D.C. Cir. 1980). The converse is also true; there is nothing in the legislative history that suggests that exercise of the so-called 209(b) option was designed to be the only vehicle for preserving state deeming practices.

2. Because Iowa's Spousal Responsibility Policy Applies In Only A Fraction Of Medicaid Cases, Its Enforcement Is Not Tantamount To Exercise Of The 209(b) Option.

As can be seen by the discussion above, Iowa's spousal responsibility policy does not do violence to the substantive eligibility criteria that must be applied in SSI states. Iowa adopts and follows the liberalized standards reflected in the program. Thus, even applying Iowa's deeming policy, there are persons in Iowa who are eligible for Medicaid who would not qualify if Iowa had chosen to become a 209(b) state.

In addition, however, it should be noted that, according to the Secretary, "only seven percent of Medicaid nursing home population have living spouses, many of whom are themselves already receiving assistance, and thus have no 'deemable income'." 42 Fed. Reg. 268 at 2684, at 2685 (Jan. 13, 1977). Thus, Iowa's spousal responsibility policy applies only to a small fraction of Medicaid recipients.

The bottom line is clear: Iowa's policy of spousal responsibility does not transform Iowa into a 209(b) state through the back door. Its policy applies only to a narrow category of Medicaid recipients, and within that category, the liberalized SSI income and resource standards are expressly recognized and given their Congressionally prescribed effect.

III. The Congressional Delegation Of Power To The States To Develop Spousal Financial Responsibility Policies, Consistent With Valid Standards Promulgated By The Secretary, Rests On Sound Policy Grounds.

A. Reasonable Policies Of Spousal Responsibility Help States Target Their Medicaid Dollars To Those Most In Need And Promote Perceptions Of Fair Administration.

It is a political truism today that federal and state governments live in an era of limited resources. Indeed, one of the challenges facing governmental officials is to streamline government welfare programs to provide assistance to those most in need while at the same time efficiently removing the underserving from the welfare rolls.

Reasonable policies of spousal responsibility accomplish this goal. They eliminate the possibility that comparatively wealthy spouses will simply refuse to provide funds for their institutionalized spouse, thereby qualifying the applicant spouse for welfare benefits. As observed by Judge Pell in his dissent in *Brown* v. *Stanton*, a refusal to require spousal responsibility is:

> an open invitation for the spouse to decide that he or she does not wish to make the excess payment. In this era of inflation, and giving consideration to the human inclination not to pay out money when one doesn't have to, I think it reasonable to conclude that few would decline the invitation. 617 F.2d 1224, at 1234 (7th Cir. 1980)

The gutting of administratively enforced spousal financial responsibility as proposed by the Secretary would thus lead to depletion of funds that would otherwise be available to the Medicaid treasury. This depletion would adversely impact efforts to establish satisfactory benefit levels, provide a wide range of service coverage, and maintain relatively liberal eligibility requirements such as those that obtain in SSI states as compared to states who follow the 209(b) option. The result sought by petitioners will thus likely disadvantage those most in need of Medicaid assistance.[11]

In addition to destroying the focus of welfare dollars, elimination of effectively enforced spousal responsibility is highly unfair to those who voluntarily contribute. As was noted in the prevailing opinion below: "A result ousting state authority to require reasonable deeming would be most unfair to the noninstitutionalized spouse who does not contribute what he can to the care of his spouse or to the taxpayers who pay for such care when they are not legally obligated to do so." *Herweg* v. *Ray*, 619 F.2d 1265, 1272 (8th Cir. 1980).

B. Reliance On State Responsibility Laws Is Not A Meaningful Alternative.

It has been suggested that Congress included Section 17(D) in the Medicaid Act Simply to allow states to enforce "relative responsibility laws" against noncontributing spouses. But this Court expressly rejected this approach in *Schweiker* v. *Grey Panthers*. There, the court cited Judge Pell in *Brown* v. *Stanton*, where he noted that it is not:

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[11] However, there is at least one district court case where spousal financial responsibility seems to have been carried to an extreme extent that would evoke pathos in the most hardened state administrator. *See Franssen* v. *Juras*, 406 F.Supp. 1375 (D. Ore. 1975). But such extreme standards may be challenged as unreasonable under 42 U.S.C. § 1396a(a)(17). In addition, the Secretary may promulgate standards limiting the ability of the states to engage in such harsh application of spousal financial responsibility.

> . . . an answer to say that the state can take action against the spouse to recover that which the spouse was legally obligated to pay. (It is) unrealistic to think that the state will engage in a multiplicity of continuing individual lawsuits to recover the money it should not have had to pay out in the first place, 617 F.2d at 1234, cited with approval in *Grey Panthers, supra,* 101 S.Ct. at 2641.

Iowa strongly presses this position before the Court. Lawyers for the Department of Social Services in Iowa are paid their salaries out of the budget of the Department, see § 13.6, Code of Iowa (1981). In order to effectively enforce spousal responsibility laws by filing the multitude of lawsuits, prosecuting them to judgment, and following them through pursuit of creditors remedies if necessary, substantial legal resources would be required.[26] Because the increased legal costs would be drawn from the Social Services budget, fewer dollars would be available for real services.[27]

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[26] Respondents respectfully draw this Court's attention to the uncelebrated Iowa case of *Cherokee County* v. *Smith,* 258 N.W. 182 (Iowa 1935). In this case, Cherokee County sued parents of an adult son under financial responsibility laws to recover a $55 payment by the overseer of the poor. The case resulted in protracted litigation, including an appeal to the state supreme court. The litigative costs far exceeded potential recovery.

While *Cherokee County* obviously represents an extreme example, it graphically illustrates the impracticality of judicial enforcement of family responsibility laws. For a critical discussion of the above case, *see* Tully, *supra,* n. A, at 35-6.

Judicial frustration over inefficiencies in legal enforcement of family responsibility laws is unfortunately illustrated by a case in which a judge is reported to have called all support cases simultaneously and instructed the line up to plead guilty to violations. *See* ten Broeck, *supra,* n. A, at 622-63.

[27] The financial pressures upon Iowa's Medicaid program are growing increasingly severe. Moreover, Congress has reduced Medicaid payments to the states by 3% for fiscal year 1982, 4% for fiscal year 1983, and 4.5% in 1984. *See* the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, Sec. 2161, 95 Stat. 803 (1981). Given the expected

CONCLUSION

The ruling of the United States Court of Appeals for the Eighth Circuit upholding Iowa's Medicaid spousal financial responsibility policy should be affirmed.

Respectfully submitted,

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cut in federal dollars, state officials in September, 1981, predicted a Medicaid shortfall of $5,683,000 in program funds and a $150,000 deficit in administration for fiscal year 1982. Department of Social Services, *Overview of Federal Budget Reductions on Department of Social Services,* September 9, 1981, at 14 (simply stating estimates without elaboration).

The notion that family responsibility laws originally evolved as a device to reduce public expenditures appears generally recognized. *See e.g.* M Rosenbaum, *Are Family Responsibility Laws Constitutional,* 1 Fam. L. Q. vol. 4, 55, 56 (1967)

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No. 80-60

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ELVINA M. HERWEG, by her husband and next friend, Darrell E. Herweg; and DARRELL E. HERWEG, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ROBERT D. RAY, individually and in his capacity as Governor of the State of Iowa; and KEVIN J. BURNS, individually and in his capacity as Commissioner of the Iowa Department of Social Services,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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REPLY BRIEF OF PETITIONERS

I. THE REGULATION AT ISSUE, 42 C.F.R. § 435.723, MUST BE EVALUATED UNDER THE STANDARD OF BATTERTON v. FRANCIS, 432 U.S. 416 (1977).

Although admitting that its rules are "inconsistent with the . . . federal regulations" (Respondents' Brief, at 11), Iowa has attempted to shift the focus of this case toward an evaluation of Iowa's deeming rules and away from the federal regulations. Defendants argue that the state's rules constitute a better interpretation of the federal statutory scheme and that, therefore, despite the conflict with the Secretary, they must be upheld by this court. See Respondents' Brief, at 5.[1/] Iowa, however, has addressed the wrong question.

As both the Brief of Petitioners and

1/ "Iowa . . . believ[es] its position [to be] most consistent with the Medicaid program . . . ." Resp. Br., at 5.

that of the United States have pointed out, the issue for this Court is not the reasonableness of Iowa's rules, but, rather, whether the Secretary's regulations are a proper interpretation of the statute. Congress has delegated to the Secretary, not to the states, the power to enact regulations under 42 U.S.C. § 1396a(a)(17)(B). This Court held that regulations promulgated by the Secretary under this authority are therefore entitled to "legislative effect." Schweiker v. Gray Panthers, 101 S.Ct. 2633, 2640 (1981).

Consequently, the Secretary's regulation, 42 C.F.R. § 435.723, must be upheld, and followed by Iowa, unless the state can demonstrate that the regulation is impermissible under the strict test set forth in Batterton v. Francis, 432 U.S. 416

(1977).[2] The Batterton test does not require this Court to draw fine lines between the views of Iowa and the Secretary regarding congressional directives. On the contrary, Batterton focuses on a much narrower and simpler proposition -- whether the Secretary's interpretation can be viewed to comport with the statute. Id., at 425-426.

Batterton thus acknowledges the modern day congressional need to delegate "legislative" authority to government agencies in order to insure efficient and rational rules for numerous complex federal programs. Without such an option, Congress would be forced to determine on its own the minute details of thousands of federal programs.

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[2] Defendants' inaccurate focus on state rather than federal enactments is highlighted by their failure to discuss or even cite the Batterton case.